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11/14/2011 03:46 PM

To <@fec.gov>
cc <Commissioner@fec.gov>, <Commissioner@fec.gov>, <Commissioner@fec.gov>, <commissioner@fec.gov>, <s@fec.gov>, <E@fec.gov>, "S" <s@campaignfreedom.org>
Subject Comments of Center for Competitive Politics on Internet Communication Disclaimers

Dear Ms. Rothstein,

I attach the comments of the Center for Competitive Politics on the Advanced Notice of Proposed Rulemaking regarding Internet Communication Disclaimers, announced at 76 Fed. Reg. 63567 (October 13, 2011).

An electronic version of this document has also been filed through the Commission's website.

Respectfully submitted,

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Comments of CCP on Internet Communication Disclaimers.pdf

November 14, 2011

Ms. Amy L. Rothstein
Assistant General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

VIA ELECTRONIC MAIL

Re: Comments of Center for Competitive Politics on Internet Communication Disclaimers, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 63567 (Oct. 13, 2011).

Dear Ms. Rothstein:

Anyone at all familiar with Facebook, Google+, Jaiku, Kiwibox, LinkedIn, Tumblr or Twitter knows that advertisers are saying more and more with fewer and fewer characters. These technologies are revolutionizing campaigns and attracting people that were politically uninvolved just three or four years ago. This is a good thing and should be encouraged by removing barriers to political participation wherever possible.

The Center for Competitive Politics recommends that the Commission open a Notice of Proposed Rulemaking on Internet Disclaimers for three reasons. First, to relieve the burden on the existing exceptions to disclaimer law that comes from applying them beyond the situations for which they were originally crafted. Second, to provide an objective test for determining when placing disclaimers on Internet communications is impracticable. And, third, to provide a rationale for the conclusion reached in Advisory Opinion 2010-19 (Google, Inc.), as advisory opinions issued without an accompanying rationale are of little value to the regulated community. A new rulemaking would meet the Commission's responsibilities to "minimize the need for serial revisions to [its] rules" and to "adapt to new or emerging Internet technology in the future." Internet Communication Disclaimers, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 63576, 63569 (Oct. 13, 2011).

Background

Congress requires the disclaimers of 2 U.S.C. § 441d(a) to "inform[] the public whether ostensibly unaffiliated organizations taking positions in an election or beseeching contributions from the public are doing so at the behest of candidates." *FEC v. Survival Educ. Fund, Inc.,* 65 F.3d 285, 295 (2d Cir. 1995).[1] As the Supreme Court has stated, these disclaimers "insure that voters are fully informed about the person or group who is speaking." *Citizens United v. FEC,* 130 S. Ct. 876, 915 (2010) (internal quotations and alterations removed). With these purposes in mind, the Commission has always tried to "interpret[] the Act and its regulations in a manner consistent with contemporary technological innovations." Advisory Opinion 1999-09 (Bradley).

The Commission has reviewed three notable advisory opinion requests on new communications technology in the past ten years. The first, Advisory Opinion 2002-09 (Target Wireless), reached a workable conclusion. Target Wireless asked whether SMS text messages limited to 160 characters per screen could be exempt from the disclaimer requirements. *Id.* The Commission determined that the messaging medium was exempt as a "small item," since the disclaimer could have consumed anywhere from 30 to 130 of the 160 characters available.

In Advisory Opinion 2010-19, Google, Inc. asked the Commission if it could "sell text advertisements consisting of approximately 95 characters to … political committees if those advertisements did not include disclaimers." Internet Communication Disclaimers, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 63576, 63568 (Oct. 13, 2011). The Commission voted to approve Google's request, but could not agree on a legal rational for its conclusion. *Id.* Some commissioners thought the "display [of a committee's] URL" in Google's Ad Words product and a "landing page that contains a full disclaimer" made the activity permissible. *See* Concurring Statement of Vice Chair Cynthia L. Bauerly, Commissioner Steven T. Walther, and Commissioner Ellen L. Weintraub, Advisory Opinion 2010-09 (Google, Inc.) at 2. Other commissioners believed that including disclaimers would have been "impracticable" under 11 CFR 110.11f(1)(ii). *See* Concurring Statement of Chairman Matthew S. Petersen, Advisory Opinion 2010-19 (Google, Inc.).

The problem with failing to issue a rationale in the Google opinion was best described by another commissioner, who noted that "under this 'no rationale' approach … it will be impossible for regulated entities to determine whether their advertising programs are materially indistinguishable from Google's, and therefore covered by the opinion." Statement for the Record of Commissioner Caroline C. Hunter, Advisory Opinion 2010-09 (Google, Inc.) (internal citations and quotations omitted).

[1] The interests in disclosure generally are to "provide the electorate with information … to aid the voters in evaluating those who seek federal office;" to "deter actual corruption and [its] appearance … by exposing large contributions and expenditures to the light of publicity;" and to "gather[] the data necessary to detect violations of the contribution limitations." *Buckley v. Valeo,* 424 U.S. 1, 66-68 (1976).

The Commission was unable to reach agreement in the latest advisory opinion request on this question, Advisory Opinion 2011-09 (Facebook). Internet Communication Disclaimers, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 63576, 63568 (Oct. 13, 2011). But the draft advisory opinion, which would have curtailed Facebook's proposed advertising model if adopted by the Commission, contained an errant phrase that bears discussion: "The limitation on the size or number of characters that Facebook allows to be included in a Facebook ad is *not mandated by the physical limitations of the display medium or Internet technology*." *See* Agenda Doc. No. 11-32, Draft AO 2011-09 (Facebook) (emphasis added). The phrase seems harmless enough, but it is not. Its error lies in the presumption that the Commission may substantially alter the products that a mass media provider like Google or Facebook offers its advertisers, or else force advertisers to forego that offering.

An NPRM tailored to Internet disclaimers is wise

Rather than decide which Internet products cannot accept political advertising, the Commission should continue its tradition of respecting companies' choices of products and speakers' choices of message, including the means through which that message is expressed. Committees continue to have wide discretion to determine how they spend campaign funds to influence elections. *See generally* Advisory Opinion 2000-37 (Udall). The Commission has been reluctant to dictate the communication methods used by committees. Nor has the Commission been eager to dictate business models to messaging media, *i.e.* to service providers. This rightful reticence is reflected in the Commission's "small items" and "impracticable" exceptions to disclaimer law. Indeed, upon closer inspection, this is the *point* of the "small items" and "impracticable" exceptions to disclaimer law, as can be illustrated with a few examples.

Campaign buttons come in a standard size. The standard size does not accommodate both a campaign message and a full disclaimer, as buttons constitute the paradigmatic example of a "small item" excepted from advertising disclaimers. 11 CFR 110.11(f)(1)(i). We have all seen, however, larger, clown-sized buttons that would easily accommodate a message and disclaimer. Nonetheless, the Commission, rightly, does not ask committees to choose between the clown-sized buttons with disclaimers or no buttons at all. The Commission does not ask whether an exception is "mandated by the physical limitations of [button] technology." Rather, the Commission recognizes that standard-sized buttons are a widely provided product and a permissible outlet under the First Amendment—one which committees may use without a disclaimer.

The Commission is also aware of standard-sized bumper stickers, *see* 11 CFR 110.11(f)(1)(i), and equally aware that adhesive-backed logos can be manufactured in most any size. Nonetheless, the Commission, rightly, does not ask committees to choose between larger adhesive logos with disclaimers or no logos at all. The Commission does not ask whether an exception is "mandated by the physical limitations of [adhesive logo] technology." Rather, it recognizes that committees may use (standard-sized) bumper

stickers to speak to voters, and excuses speakers from including disclaimers on those bumper stickers.

The same is true of the "impracticable" exception. Take the paradigmatic example of skywriting. 11 CFR 110.11(f)(1)(ii). The Commission surely understands that any airplane capable of skywriting may also be capable of towing a banner; possibly even simultaneously. Yet, the Commission does not consider requiring planes that would skywrite "Vote for Jones" to also tow a banner that says, "Paid for by Jones for Senate, Inc." The Commission does not really know the technological capabilities of airplanes, and it, wisely, does not attempt to determine whether towing a banner behind a skywriting plane is affected "by the physical limitations of … [aviation] technology." The Commission could open a rulemaking to determine the true technological capabilities of airplanes, but the Commission is sensible about the matter. Aviation firms choose to offer skywriting as a standard service to any advertiser. The Commission wisely ends its inquiry there—and makes a determination about the impracticability of attaching a disclaimer based on that inquiry alone.

Likewise, Facebook (like Google and Target Wireless before it) has chosen to offer a standard-sized, character-limited advertising product to its customers. *See* Advisory Opinion 2011-09 (Facebook). The Commission need not second guess Facebook's product offering any more than it would inquire whether skywriters can simultaneously tow a banner. Any insistence that Facebook include the URL of its advertiser, link to its advertiser's landing page, or add a rollover feature to a product, where the company otherwise would not do so, is beyond the Commission's purview.

In Advisory Opinion 2007-33, the Club for Growth PAC proposed to purchase short 10- and 15-second television ads and to "dispense with" or "truncate" the applicable disclaimers. The Commission did not approve the request. *Id.* The Center for Competitive Politics believes that the decision to run a 15-second ad is to be made by the advertiser. Broadcast providers offer 15-second products; the Commission has traditionally recognized the right of committees to spend funds as they wish; therefore, the Commission should simply determine whether disclaimers on 15-second ads are practicable or impracticable.

But even if the Commission retains the reasoning of Advisory Opinion 2007-33 when it re-writes its rules, the scenario posed there is distinguishable from the facts set forth in the Facebook request. The Club for Growth PAC asked whether it could purchase a shorter ad, even as the media provider, a broadcast station, would gladly have sold them a longer one. The Facebook request, however, is a media *provider* making a business decision to provide a certain product to its advertisers. Some commissioners second-guessed the product and whether political committees may use it, rather than determine whether placing disclaimers on that product would be impracticable. To use an analogy, Facebook wanted to offer skywriting (an advertising product) to its customers, but some commissioners insisted that Facebook simultaneously tow a banner (offer a longer product) or not offer skywriting at all. This desire to dictate advertising

products to companies should be avoided in any future rulemaking, and can be cured by creating a new exception for Internet communications, as discussed more fully below.

Creating a new exception for Internet communications

Current disclaimer regulations provide insufficient guidance to speakers, even those familiar with the well-recognized exceptions applicable to goods, clothes, and skywriting, when those speakers want to make Internet communications. Therefore, the Commission should consider adding a fourth disclaimer exception to the three listed at 11 CFR 110.11(f)(1).[2]

This new regulatory exception should excuse disclaimers in any Internet advertising product where the number of characters needed for a disclaimer would exceed 4% of the characters available in the advertising product, exclusive of those reserved for the ad's title.[3] This four-percent figure is taken, by analogy, from the requirements for television advertising. *See* 11 CFR 110.11(c)(3)(iii)(A).

For example, an authorized committee titled "Jones for Congress" would be excused from placing a disclaimer on any Internet advertising product that provided fewer than 750 characters. The disclaimer—in this case, "Paid for by Jones for Congress"—would consume thirty (30) characters, including the spaces between the words. (Thirty characters is 4% of 750 characters). This means that any Internet product on which Jones for Congress advertises for a fee must carry a disclaimer if the display page is capable of carrying 750 or more characters. Realistically, this would include almost any page on the Internet, except for the social networking ads that have occupied the Commission since its Target Wireless opinion and prompted this rulemaking.

Even a longer disclaimer, such as "Paid for by Americans for Better Politics and not authorized by any candidate or candidate's committee. www.betterpolitics.org," yields a workable outcome. The long example is 123 characters, including spaces between words, and would be required for any website with 3075 or more characters, which is most every page on the Internet. This new regulatory exception would excuse disclaimers on all of the Internet-advertising products commissioners have considered to be "small items" in the past, and on all Internet-advertising products on which commissioners have believed disclaimers would be "impracticable."

[2] It might be advisable to renumber the exceptions to make the existing exception at (iii) (on checks, receipts and administrative items) a new exception (iv), and to number any new exception for Internet communications as (iii).

[3] The ratio would be based upon the number of characters in the disclaimer as compared to the number of characters available in the ad product display, and not based upon a comparison to the total number of characters available on the page on which the product is placed.

This new regulatory exception would have the added benefit of being objective, as it is tied to the number of characters available to the advertising product. Any compliance lawyer with a calculator can figure it out.[4]

The Commission asks whether it should "consider abbreviated advertisement disclosure for Internet advertisements," Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. at 63569, or "allowing a link [] to satisfy the disclaimer requirement." *Id.* While these proposals have the virtue of not dictating product features to a media provider, like Google or Facebook, they have other problems. They dictate content to an advertiser without satisfying either the statutory requirements of 441d(a), which require disclaimers to carry specific language, or the purpose of disclaimers stated by the courts, which is to "inform[] the public whether … organizations taking positions in an election … are doing so at the behest of candidates." *Survival Educ. Fund,* 65 F.3d at 295. The better course is for the Commission to recognize that disclaimers are impracticable in some forms of Internet advertising, and allow that advertising to take place without the disclaimers. To address the possibility of abbreviated advertisement disclosure for Internet advertisements, the Commission should note the matter in its legislative recommendations to Congress.

The Commission asks whether it should consider rollover features to allow speakers to meet the disclaimer obligations. Internet Communication Disclaimers, Advanced Notice of Proposed Rulemaking, 76 Fed. Reg. 63567, 63569 (Oct. 13, 2011). Rollover features should be considered, though perhaps not in the manner originally intended in the ANPRM. If a rollover feature is part of an Internet advertising product offered by a media provider, then the number of characters available in the rollover screen would added to the amount available in the ad itself, and would count towards calculating the overall percentage. For instance, if a Google Ad Words product were to include a rollover feature, the number of characters available in the rollover display would simply increase the number of characters available to the advertiser and be tallied towards the four-percent ratio discussed above.

[4] It is an old joke that if lawyers were any good at math they wouldn't be lawyers. But compliance attorneys are (too) often called upon to determine percentages: whether an organization's expenditures are its "major purpose," *see Buckley v. Vaelo,* 424 U.S. 1, 79 (1976); whether an advocacy organization's "primary purpose" is campaign activity, *see* 26 U.S.C. § 501(c)(4); whether a educational organization has spent 5% of its total activity on lobbying, *see* 26 U.S.C. §501(c)(3), or whether any employee spends 20% of its time on "lobbying activities." *See* 2 U.S.C. 1605 *et seq.*

Conclusion

A rulemaking on Internet communication disclaimers has the potential to offer clarity to political speakers in an ever-changing medium. We look forward to the Commission issuing a Notice of Proposed Rulemaking on this matter.

Respectfully submitted,

/s/ S.M. Hoersting

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